

1 CIVIL DISTRICT COURT  
2 PARISH OF ORLEANS  
3 STATE OF LOUISIANA  
4  
5  
6

7 GLORIA SCOTT AND \*  
8 DEANIA JACKSON, \*  
9 \* NO. 96-8461  
10 VERSUS \* DIVISION "I"  
11 \* SECTION 14  
12 THE AMERICAN TOBACCO \*  
13 COMPANY, INC., ET AL. \*

14  
15  
16

17 Transcript of proceedings before the  
18 Honorable Richard J. Ganucheau, Judge Pro Tempore,  
19 Civil District Court, Parish of Orleans, State of  
20 Louisiana, 421 Loyola Avenue, New Orleans, Louisiana  
21 70112, commencing on June 18, 2001.

22  
23  
24  
25  
26  
27 \* \* \* \* \*  
28 Friday Morning Session  
29 June 6, 2003  
30 9:40 a.m.  
31 \* \* \* \* \*  
32

21358

1 I N D E X  
2 Witness Page  
3 JERRY F. WHIDBY, Ph.D.  
Cross-continued (By Mr. Russ Herman) 21362  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

29  
30  
31  
32

21359

1 A P P E A R A N C E S  
2 HERMAN HERMAN KATZ & COTLAR, L.L.P.  
3 Attorneys at Law  
4 (By: Russ M. Herman, Esquire  
5 Stephen J. Herman, Esquire)  
6 820 O'Keefe Avenue  
7 New Orleans, LA 70113

8 - AND -

9 BENCOMO & ASSOCIATES  
10 Attorneys at Law  
11 (By: Raul R. Bencomo, Esquire)  
12 Suite 2110, One Poydras Plaza  
13 639 Loyola Avenue  
14 New Orleans, LA 70113

15 - AND -

16 MURRAY LAW FIRM  
17 Attorneys at Law  
18 (By: Stephen B. Murray, Esquire)  
19 Suite 2550, LL&E Tower  
20 909 Poydras Street  
21 New Orleans, LA 70112-4000

22 - AND -

23 BRUNO & BRUNO  
24 Attorneys at Law  
25 (By: Joseph M. Bruno, Esquire)  
26 855 Baronne Street  
27 New Orleans, LA 70113

28 - AND -

29 LEGER & MESTAYER  
30 (By: Walter J. Leger, Jr., Esquire)  
31 600 Carondelet Street, 9th Floor  
32 New Orleans, LA 70130

33 - AND -

34 GAUTHIER DOWNING LaBARRE BEISER & DEAN  
35 Attorneys at Law  
36 (By: Deborah M. Sulzer, Esquire)  
37 3500 North Hullen Street  
38 Metairie, LA 70002  
39 - AND -  
40 CARTER & CATES  
41 Attorneys at Law  
42 (By: Kenneth M. Carter, Esquire)  
43 Suite 1230, Energy Centre  
44 1100 Poydras Street  
45 New Orleans, LA 70163-1230

46 - AND -

47 21360

48 A P P E A R A N C E S (Continued)  
49 THE LAW OFFICES OF JACK M. BAILEY, JR.

(By: Jack M. Bailey, Jr., Esquire)  
3  
2790 Fairfield Avenue  
Shreveport, LA 71104

4  
- AND -  
5

LAW OFFICE OF DANIEL E. BECNEL, JR.  
6  
(By: Daniel E. Becnel, Jr., Esquire  
Lynn Swanson, Esquire)  
7  
106 West Seventh Street  
Reserve, LA 70084  
8

(ATTORNEYS FOR THE PLAINTIFFS)

9  
10 JONES DAY  
11 (By: Kevin D. Boyce, Esquire)  
12 901 Lakeside Avenue  
Cleveland, OH 44114-1190  
13

- AND -  
14

15 STONE PIGMAN WALTHER  
WITTMANN, L.L.C.  
16 Attorneys at Law  
(By: Phillip A. Wittmann, Esquire)  
546 Carondelet Street  
17 New Orleans, LA 70130  
18 (ATTORNEYS FOR THE DEFENDANT  
R. J. REYNOLDS TOBACCO COMPANY)  
19  
20

21 KING & SPALDING  
22 (By: Jack Williams, Esquire  
Richard A. Schneider, Esquire)  
191 Peachtree Street  
23 Atlanta, GA 30303-1763  
24 (ATTORNEYS FOR THE DEFENDANT BROWN &  
WILLIAMSON TOBACCO CORPORATION,  
25 INDIVIDUALLY AND AS SUCCESSOR BY  
MERGER TO THE AMERICAN TOBACCO  
26 COMPANY)  
27

28 ADAMS & REESE, L.L.P.  
(By: Charles F. Gay, Jr., Esquire  
Ronald J. Sholes, Esquire)  
29 Suite 4500, One Shell Square  
30 701 Poydras Street  
New Orleans, LA 70139  
31

(ATTORNEYS FOR THE DEFENDANT  
PHILIP MORRIS, INCORPORATED)

21361

1 A P P E A R A N C E S (Continued)  
2 SHOOK HARDY & BACON  
(By: Gary R. Long, Esquire  
3 Jennifer Brown, Esquire)  
One Kansas City Place  
4 1200 Main Street  
Kansas City, MO 64105-2118  
5

(ATTORNEYS FOR THE DEFENDANT  
LORILLARD TOBACCO COMPANY)

7  
8       REPORTED BY:  
9

10           Nicholas A. Marrone, RMR, CRR  
11           Registered Merit Reporter  
12           Certified Realtime Reporter  
13           (No. 21011)  
14           HUFFMAN & ROBINSON, INC.  
15           One Shell Square, Suite 250 Annex  
16           New Orleans, LA 70139  
17           (504) 525-1753     (800) 749-1753  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

21362

1       Friday Morning Session  
2           June 6, 2003

3           9:40 a.m.

4           \* \* \* \* \*

5           P R O C E E D I N G S

6           \* \* \* \* \*

7       (In open court with a jury present:)

8       THE COURT:

9       Good morning.

10      MR. RUSS HERMAN:

11      Good morning, Judge.

12      THE COURT:

13      Doctor, you are still under oath.

14      THE WITNESS:

15      Yes, sir, I understand.

16      THE COURT:

17      Mr. Herman, are you ready to continue  
18      with your cross?

19      MR. RUSS HERMAN:

20      Yes, I am.

21      Good morning, Your Honor. Good  
22      morning, ladies and gentlemen of the jury,  
23      and learned counsel.

24      -- -- --

25      JERRY F. WHIDBY, Ph.D.

26      being previously duly sworn by the Clerk, testifies  
27      and says further as follows:

28      -- -- --

29      CROSS-EXAMINATION (Continued)

30      BY MR. RUSS HERMAN:

31      Q.      Good morning, Dr. Whidby.

32 A. Good morning.

21363

1 Q. Now, you recall yesterday I had a series of  
2 questions about the gentlemen's agreement and the  
3 alleged conspiracy among these defendants. Do you  
4 recall that?

5 A. I remember you asked me some questions about  
6 that, yes.

7 Q. Now, do you know what the CTR was, Center for  
8 Tobacco Research?

9 A. I have heard that, yes. I was not really  
10 aware of the CTR while I was at Philip Morris.

11 Q. Were you aware in discussions within  
12 Philip Morris and when the management came down from  
13 New York that the CTR and the Tobacco Institute were  
14 funded by your company and Lorillard, Brown &  
15 Williamson, and R. J. Reynolds? Were you aware of  
16 that?

17 A. No, I was not.

18 Q. Did you ever hear that CTR was created by the  
19 tobacco companies as a cheap form of insurance?

20 A. No, I never did.

21 Q. Or that it was created as a front  
22 organization?

23 A. No.

24 Q. And in your search when you first went to  
25 work at Philip Morris, did you run across any  
26 documents like that?

27 A. I don't recall running across anything like  
28 that, no.

29 Q. Well, in the first five or six trials you  
30 testified in, was the firm of Shook Hardy one of the  
31 firms that represented Philip Morris and put you on  
32 the stand?

21364

1 A. I believe that's one of the firms, yes.

2 Q. As a matter of fact, out of the first five or  
3 six trials, I think that they put you on the stand  
4 five times?

5 A. I really, really don't recall.

6 Q. A number of times?

7 A. I remember one time specifically. Whether it  
8 was more than that or not, I'm not sure.

9 Q. Now, did they ever provide you with documents  
10 about CTR being a front?

11 A. In the context of litigation, like here in a  
12 courtroom, I have seen those documents, some of  
13 those documents, yes.

14 Q. And did you discuss -- I can't ask you what  
15 the attorneys told you, but did you discuss that  
16 document with attorneys?

17 A. I may have read it, and I don't remember the  
18 discussions, if any.

19 MR. RUSS HERMAN:

20 Your Honor, I would like to call up  
21 Exhibit No. 3515, admitted on February  
22 5th, 2003, during the testimony of  
23 Dr. Jaffe.

24 BY MR. RUSS HERMAN:

25 Q. It's on your screen, sir?

26 A. Yes. And I have the same problem today I had  
27 yesterday. It's very difficult for me with these  
28 glasses to see that.

29 It's not as bad as it was. I can see it now.  
30 Q. It's dated November 17th, 1978; correct?  
31 A. Well, maybe you better give me a hard copy.  
32 MR. RUSS HERMAN:

21365

1 May I approach, Your Honor?

2 THE WITNESS:

3 Please?

4 THE COURT:

5 Yes.

6 THE WITNESS:

7 I can see it now. Blown up I can see  
8 it. Whoever did the blowing up, thank  
9 you.

10 MR. RUSS HERMAN:  
11 Mr. Gethers. Thank you, Carl.

12 BY MR. RUSS HERMAN:

13 Q. It's dated November 17th, 1978; correct?

14 A. Yes, sir, it is.

15 Q. You were in at Philip Morris at that time,  
16 were you not?

17 A. I was, yes.

18 Q. And it says from Dr. Seligman, correct, on  
19 the left, R. B. Seligman?

20 A. Yes, it does.

21 Q. And he was identified on that organizational  
22 chart as a vice president in charge of research, was  
23 he not?

24 A. I believe that's right.

25 Q. And you testified yesterday under questioning  
26 by Counsel Gay: We didn't live in a cave, we freely  
27 exchanged information in research and development;  
28 correct?

29 A. That is exactly what we did, we freely  
30 exchanged information and ideas about what we  
31 thought.

32 Q. Do you see where it says "To: CTR file"?

21366

1 It's from Mr. Seligman, a pm to his CTR file?

2 A. I do see that, yes.

3 Q. And if you read down four names, does it say  
4 Bill Shinn, Shook Hardy Bacon?

5 A. Yes, it does.

6 Q. And if you continue to read down, it has  
7 representatives of -- if you look at that list, it  
8 has representatives of Brown & Williamson, R. J.  
9 Reynolds, American Tobacco and Lorillard; correct?

10 A. Yes, it does.

11 Q. And then it says at the bottom of that list,  
12 Jim Bowling, senior vice president for corporate  
13 affairs, Philip Morris; correct?

14 A. It says what it says. It does say that, yes.

15 Q. Doesn't it say that?

16 A. Yes.

17 Q. And Mr. Bowling was up at the top, he was one  
18 of those New York people, wasn't he?

19 A. His title here is corporate --

20 Q. Senior --

21 A. Senior vice president, yes, for corporate --

22 Q. For corporate affairs. And that was in  
23 New York, not Richmond; right?

24 A. I think that's right.

25 Q. And then it gives Mr. Seligman. And then it

26 says Tom Osdene, O-s-d-e-n-e, director of research  
27 for Philip Morris U.S.A. That was the cigarette  
28 company; correct?

29 A. Philip Morris makes cigarettes, yes.

30 MR. RUSS HERMAN:

31 Now, Your Honor, I would like to  
32 publish the document. It's already been  
21367

1 identified and introduced into evidence,  
2 Exhibit No. 3515.

3 THE COURT:

4 You may publish it.

5 BY MR. RUSS HERMAN:

6 Q. We have already covered what's on the first  
7 page so there is no need to do it again. Isn't that  
8 correct, we just reviewed that?

9 A. You reviewed part of it.

10 Q. All right. Let's put --

11 MR. RUSS HERMAN:

12 Carl, highlight the top. Would you  
13 enlarge it?

14 BY MR. RUSS HERMAN:

15 Q. It gives the date and Dr. Seligman, meeting  
16 in New York on November 15, '78; correct?

17 A. No. November 17.

18 Q. I'm sorry, I thought it said November 15 --

19 A. I'm sorry, I'm sorry. The date of the  
20 document, I was reading the wrong date. Forgive me.

21 Q. I understand that. It's got two dates on  
22 it.

23 At any rate, we both agree it's November '78;  
24 right?

25 A. Yes, sir.

26 Q. And you were working in Philip Morris in  
27 Richmond in research at the time; correct?

28 A. Yes.

29 Q. But the meeting took place in New York;  
30 correct?

31 A. That's right.

32 Q. And that's a CTR file; right?

21368

1 A. It says that yes.

2 Q. And it's Mr. Seligman who was in charge, vice  
3 president in charge of research in Richmond where  
4 you were working; correct?

5 A. Yes.

6 Q. Now, let's go through the list. I want to  
7 make sure we got it --

8 MR. RUSS HERMAN:

9 Would you blow that up, please?

10 BY MR. RUSS HERMAN:

11 Q. It says those present:

12 Mr. Peebles, general counsel, Brown &  
13 Williamson.

14 Mr. Tucker, general counsel for R. J.  
15 Reynolds.

16 Tim Finnegan, retained counsel.

17 Bill Shinn, Shook Hardy & Bacon.

18 Arnold Henson, general counsel, American  
19 Tobacco.

20 Janet Brown, retained counsel for CTR.

21 Wally Hughes, a vice president for Brown &  
22 Williamson.

23           Alex Spears, a vice president of Lorillard.  
24           And then it says Jim Bowling, senior vice  
25 president, corporate affairs, Philip Morris, Inc.  
26           That was the holding company in New York;  
27 correct? Didn't Philip Morris, Inc., wasn't that  
28 the mother company for Philip Morris U.S.A., the  
29 cigarette company?  
30 A.        It may have been, yes.  
31 Q.        All right. Then Mr. Seligman again, and then  
32 Mr. Osdene, the director of research. Correct?

21369

1 A.        Correct.  
2 Q.        All right. Now, let's go to the first  
3 sentence that's on the bottom of that page. As you  
4 pointed out, we didn't read the whole thing.

5           MR. RUSS HERMAN:

6           Would you blow that up, please?

7 BY MR. RUSS HERMAN:

8 Q.        At the outset, Arnold Henson reminded  
9           all participants of the meeting that there  
10          should be no written record of what  
11          transpired issued for distribution.

12        Were you ever told by Mr. Seligman or  
13 Mr. Osdene, who was in charge of research, why  
14 written records for distribution were not kept of  
15 these meetings?

16 A.        They were told about that, but I was never  
17 told to keep a written record and destroy records.

18 Q.        Let's read the next sentence. It says:

19           It's all right to take notes, which  
20          you would keep in your own personal file.  
21          Do you see that?

22 A.        Yes.

23 Q.        Well, were you ever told, look, if there is  
24 something we don't want anybody to know about, you  
25 keep those notes in your personal file, don't put  
them in the corporate records? Were you ever told  
27 that?

28 A.        Never told that, no. As a matter of fact, I  
29 kept files, and everybody else kept files that I  
30 know of.

31 Q.        We will get to that.

32 A.        Apparently this was kept.

21370

1 Q.        We will get to the question -- sir, everyone  
2 you knew kept files in writing of everything?  
3 A.        We kept all -- all the scientists at  
4 Philip Morris kept lab notebooks, and we record in  
5 our lab notebooks the experiments we did and work we  
6 did.

7 Q.        Sir, weren't some research documents  
8 shredded?

9 A.        Not to my knowledge, no.

10 Q.        Weren't there some directives by Mr. Osdene  
11 to destroy research if it didn't come out right?

12 A.        It may have been, and I have seen those in  
13 context of litigation.

14        But I will tell you what, people around me  
15 didn't shred documents. I didn't shred documents.  
16 I don't know of anybody that did shred documents.  
17 That was not the practice at Philip Morris.

18 Q.        Sir, do you understand that I respect you and  
19 that I am not trying to say that you did something

20 wrong?

21 MR. GAY:

22 Objection.

23 BY MR. RUSS HERMAN:

24 Q. Do you understand that, sir?

25 THE COURT:

26 Overruled. Answer the question, if  
27 you are able to.

28 A. I would expect you not to try to do something  
29 like that. I don't know.

30 Q. Sir, I respect everyone.

31 What I'm trying to ask you, do you understand  
32 what I'm trying to ask you is information about

21371

1 tobacco companies that we feel people need to know?

2 MR. GAY:

3 Object to the relevance.

4 THE COURT:

5 Approach the bench, please.

6 (At sidebar:)

7 THE COURT:

8 You are just going to draw  
9 objections. If you have a question, any  
10 time you say anything that's not an  
11 interrogatory, you are going to get an  
12 objection.

13 MR. RUSS HERMAN:

14 I think that was a question.

15 MR. GAY:

16 Your Honor, what he feels --

17 MR. RUSS HERMAN:

18 I think it was a question.

19 THE COURT:

20 Your last utterance was not an  
21 interrogatory, it was a statement, and  
22 that's what drew the objection.

23 If you want to read it on my screen,  
24 you can read it.

25 MR. RUSS HERMAN:

26 I tried to ask it as a question. I  
27 will accept what you say.

28 THE COURT:

29 Okay, ask a question.

30 MR. LONG:

31 Your Honor, may I raise another issue  
32 now?

21372

1 Shook Hardy & Bacon has come up  
2 again. We haven't objected. If  
3 Mr. Herman is going to try to ask this  
4 witness to connect Shook Hardy & Bacon's  
5 lawyers in the courtroom, I respectfully  
6 request so that the bell is not rung that  
7 we have a conference up here first to  
8 determine the relevance.

9 MR. RUSS HERMAN:

10 I am not going to do that. I haven't  
11 done it in these questions. I don't  
12 intend to do it.

13 THE COURT:

14 Okay. Let's move on.

15 (In open court:)

16 BY MR. RUSS HERMAN:

17 Q. Now, sir, I want to direct your attention --

18 MR. RUSS HERMAN:

19 May it please the Court, I need to  
20 point out to the Court, during the recess  
21 I think that the battery is about to go  
22 out in this. The light is not on.

23 THE COURT:

24 All right.

25 BY MR. RUSS HERMAN:

26 Q. Let's go to the second page.

27 A. Okay.

28 MR. RUSS HERMAN:

29 Carl, that second paragraph that  
30 begins, "As a means of introduction,"  
31 would you highlight that whole paragraph  
32 for Dr. Whidby, please?

21373

1 BY MR. RUSS HERMAN:

2 Q. Were you aware before you became a testifier  
3 or a consultant to testify that CTR was set up as an  
4 industry shield?

5 A. I was not.

6 Q. Were you aware before you became a testifier  
7 that CTR, one of its functions was to help legal  
8 counsel by giving advice on technical information in  
9 court trials?

10 A. No.

11 Q. Or that CTR was set up to appear at  
12 congressional hearings?

13 A. Would you repeat your question? Sorry.

14 Q. CTR has supplied spokespersons for the  
15 industry at congressional hearings. Were you aware  
16 of that before you became a testifier?

17 A. No, I was not.

18 Q. And that the monies spent at CTR would  
19 provide a base for the introduction of witnesses.  
20 You were not aware of that, sir?

21 A. No, I was not.

22 Q. Let's go to the first sentence in the next  
23 paragraph.

24 MR. RUSS HERMAN:

25 Would you enlarge that?

26 BY MR. RUSS HERMAN:

27 Q. Were you aware that CTR had been described as  
28 a front before you agreed to begin consulting and  
29 testifying?

30 A. I was not, no.

31 Q. Thank you.

32 MR. RUSS HERMAN:

21374

1 Okay, you can take that down, please.

2 BY MR. RUSS HERMAN:

3 Q. Now, do you know what the definition of  
4 clandestine means?

5 A. I have a definition. I have a definition, I  
6 think.

7 Q. Right. What is your definition of  
8 clandestine?

9 A. Hidden, probably.

10 Q. Hidden, secret?

11 A. Would be a synonym.

12 Q. Okay. And to your knowledge, that's a fairly  
13 common definition, is it not, of clandestine?

14 A. I don't know how common it is.  
15 Q. Okay, fair enough.  
16 You in your examination had several  
17 discussions about the nicotine programs that were  
18 done at Philip Morris in the '70s, '80s, and '90s in  
19 the Research Department, did you not?

20 A. We had some discussion.

21 Q. And when we put the chart up before,  
22 Dr. Dunn, he was in the Research Department while  
23 you were there, while you worked for Philip Morris  
24 in 1980; correct?

25 A. That's correct.

26 Q. And Dr. Seligman was still the vice president  
27 in charge of research, was he not?

28 A. In 1980 he may have been. I don't recall  
29 exactly.

30 MR. RUSS HERMAN:

31 Okay. I would like to put up on your  
32 screen and the Judge's screen Exhibit 3543  
21375

1 admitted in evidence on February 5th,  
2 2003.

3 BY MR. RUSS HERMAN:

4 Q. Do you see that, sir?

5 A. I see a document, yes.

6 Q. It's on Philip Morris U.S.A. stationery;  
7 correct?

8 A. Correct.

9 Q. Richmond, Virginia; correct?

10 A. Yes.

11 Q. It's 1980, at a time when you were there;  
12 right?

13 A. I was there in '80, yes.

14 Q. And it's titled "The Nicotine Receptor  
15 Program"; correct?

16 A. Correct.

17 MR. RUSS HERMAN:

18 Your Honor, I would like to publish,  
19 please.

20 MR. GAY:

21 No objection, Your Honor.

22 THE COURT:

23 With no objection, you may publish.

24 BY MR. RUSS HERMAN:

25 Q. Now, the document -- if we could just blow up  
26 the top part very quickly -- went to the vice  
27 president in charge of research, Dr. Seligman, from  
28 Dr. Dunn.

29 MR. RUSS HERMAN:

30 Now, let's go to the second page,  
31 please, where it says carbon copy at the  
32 bottom, could you blow that up, please,

21376

1 Carl? Thank you.

2 BY MR. RUSS HERMAN:

3 Q. It's copied to Mr. Osdene, who is the  
4 director in charge of research; correct?

5 A. In 1980, I think he was, yes.

6 MR. RUSS HERMAN:

7 Now, Carl, if you take that down.

8 Do you see those two lines right in  
9 the middle of the page, would you blow  
10 that up?

11 BY MR. RUSS HERMAN:

12 Q. Clandestine, as you explained, means secret.  
13 Were you ever told why the attorneys wanted to  
14 continue to insist upon a clandestine effort in  
15 order to keep nicotine, the drug, in low profile?  
16 A. You know, I don't know what the attorneys may  
17 have insisted upon, or if they did. I don't know if  
18 this was correct or not.

19 I can tell you from my personal experience at  
20 Philip Morris, we didn't keep it hidden. We talked  
21 about it. We published about it. We talked with  
22 outside people about it.

23 I don't understand what this means. It says  
24 what it says, however.

25 Q. Sir, you don't understand how it is that the  
26 vice president in charge of research, the director  
27 of research, and someone working with the director  
28 of research would make a statement to continue to  
29 insist in a clandestine effort to keep nicotine, the  
30 drug, in low profile?

31 A. I'm certainly not arguing with you, but I  
32 don't read that as being those people trying to keep

21377

1 it that way. Somebody else is trying to keep it  
2 that way.

3 And I tell you, it wasn't kept hidden or  
4 clandestine.

5 Q. Well, wasn't the reason, wasn't it discussed  
6 openly in research that nicotine was an addictive  
7 drug, and if an admission was made that nicotine was  
8 addictive, that the attorneys couldn't defend  
9 themselves in using the word "free choice"?

10 A. It wasn't discussed as that, as I remember.

11 There were people, some people had one  
12 opinion about nicotine and other people had  
13 different opinions about nicotine. It was a  
14 completely open discussion about it, as far as I  
15 remember.

16 Q. Well --

17 A. And it still is.

18 Q. In your work in the Research Department with  
19 the folks that dealt with this memo, did you ever  
20 see a memo relating to why, if there was an  
21 admission of addiction, an open admission of  
22 addiction, free choice would go out the window?

23 A. I never saw such a memo.

24 Q. Do you know whether such exists, based upon  
25 perhaps what folks have showed you since you became  
a testifier?

27 A. I don't recall that it does. I don't recall  
28 that it doesn't. It probably does, but I don't know  
29 that. It may.

30 Q. Well, you know, when you were questioned the  
31 first day by Mr. Gay, you threw in the word  
32 "choice."

21378

1 A. I didn't --

2 Q. Is that a word that you picked up to use when  
3 you became a testifier for the tobacco companies?

4 A. Absolutely not. That's the way I described  
5 it. And choice --

6 MR. RUSS HERMAN:

7 Steve, what's that number, do you

8 recall? 3559? 3509?  
9 A. Can I continue with my answer?  
10 Q. Oh, absolutely. I didn't mean to interrupt  
11 you.  
12 A. Choice to me is like if I go to the grocery  
13 store and I choose to by buttermilk or sweet milk or  
14 Pepsi or Coke, that's what I meant by free choice.  
15 And all I meant by that.

16 MR. RUSS HERMAN:  
17 I would like to put up on your screen  
18 JW-26 -- I'm sorry, Exhibit 3359.01.  
19 Thanks. It was admitted during Dr. --  
20 during Mr. Bible, the president of  
21 Philip Morris' testimony on February 13th,  
22 2003.

23 A. I apologize, but if I keep doing this all  
24 day, I'm going to have one heck of a stiff neck.  
25 May I have a hard copy?

26 Q. No need to apologize. I'm going to give you  
27 my copy. It's yellow-lined, but I think you will  
28 find it satisfactory.

29 A. Thank you very much.

30 Q. You are welcome.

31 Would you read the date?

32 A. September 9th, 1980.

21379

1 Q. Do you recognize that it's from Mr. Knopick?  
2 A. I see the name, yes. I have no idea who  
3 these people are.

4 Q. Okay, then I won't ask you. If you don't  
5 know who they are, you don't know.

6 Would you turn to the second page, please?

7 MR. RUSS HERMAN:

8 Your Honor, I would like to publish  
9 the document. It's already in evidence.

10 THE COURT:

11 No objection, I presume?

12 MR. GAY:

13 No objection.

14 THE COURT:

15 You may publish it.

16 BY MR. RUSS HERMAN:

17 Q. Would you look at the second page? And I'm  
18 going to enlarge it.

19 Would you mind reading that aloud for the  
20 record?

21 A. I feel badly about my own lack of  
22 intelligence-gathering in this situation,  
23 but I don't think the questions I now  
24 raise are academic. Shook Hardy reminds  
25 us, I'm told, that the entire matter of  
26 addiction is the most potent weapon a  
27 prosecuting attorney can have in a lung  
28 cancer/cigarette case. We can't defend  
29 continued smoking as "free choice" if the  
30 person was "addicted."

31 Q. And no one has ever shown you this document  
32 before; correct?

21380

1 A. No, sir. Not until preparation for this  
2 trial.

3 Q. Oh, in preparation for this trial. That's  
4 fine. A lawyer is entitled to show you documents to

5 prepare your testimony, so I'm not going to ask you  
6 about that.

7 Before this case, no one in your company had  
8 ever shown you this document; correct?

9 A. No, sir.

10 Q. Or discussed its contents; correct?

11 A. No, sir.

12 Q. Why not, do you know?

13 A. I have no idea.

14 MR. GAY:

15 Objection.

16 MR. RUSS HERMAN:

17 Thank you. You can just hold that  
18 folder up there. I will get that document  
19 from you later and we will save some time.

20 BY MR. RUSS HERMAN:

21 Q. Now, did you understand while you were in the  
22 Research Department that the CTR and the Tobacco  
23 Institute was actually not run by research  
24 scientists, but run by lawyers?

25 A. I already stated I didn't know about CTR or  
26 the Tobacco Institute and who ran it or whatever. I  
27 don't know.

28 Q. Without giving me any names, do you have any  
29 idea who represents the Tobacco Institute in this  
30 case?

31 A. No, sir, I do not.

32 Q. And if you met with lawyers to prepare your  
21381

1 testimony, you don't know whether they were Tobacco  
2 Institute lawyers or not, do you?

3 A. No, I don't. I don't think they were.

4 Q. Well, I can't ask you, okay. I will go on to  
5 something else.

6 3151, let me see if I can find that.

7 MR. RUSS HERMAN:

8 Learned counsel, and if it please the  
9 Court, Exhibit 3151 was admitted on  
10 February 4th, 2003. In connection with  
11 the Court's order, it's been partially  
12 redacted as Your Honor instructed.

13 BY MR. RUSS HERMAN:

14 Q. I'm going to bring this up while I ask  
15 Mr. Gethers to put it on the screen and that will  
16 help move things along; okay?

17 MR. RUSS HERMAN:

18 May I approach, Your Honor?

19 THE COURT:

20 Yes.

21 THE WITNESS:

22 Thank you.

23 MR. RUSS HERMAN:

24 You are welcome.

25 BY MR. RUSS HERMAN:

26 Q. Now, you testified, I believe, earlier that  
27 when you first went to Philip Morris, in order to  
28 bring yourself up to speed, you looked at various  
29 documents and read various documents, and later on  
30 you gathered documents at the direction of certain  
31 law firms; correct?

32 A. That's correct.

21382

1 Q. You note that this document, Exhibit 3151, is

2 marked strictly confidential at the top?  
3 A. It says that, yes.  
4 Q. And it predates your employment by some eight  
5 years. It's dated October '64. Is that correct?  
6 A. That is correct.  
7 Q. And it's a report on policy aspects of  
8 smoking and health; correct?  
9 A. Right.  
10 Q. Now, if you --  
11 MR. RUSS HERMAN:  
12 May I publish, Your Honor?  
13 MR. GAY:  
14 No objection.  
15 THE COURT:  
16 You may publish.  
17 MR. RUSS HERMAN:  
18 Thank you.  
19 Carl, would you turn to page seven?  
20 I'm sorry, page six.  
21 May we publish, Your Honor?  
22 THE COURT:  
23 You may publish it.  
24 BY MR. RUSS HERMAN:  
25 Q. At the Court's instruction we eliminated what  
26 was above what's shown on the document.  
27 MR. RUSS HERMAN:  
28 Would you please enlarge the bottom  
29 part?  
30 BY MR. RUSS HERMAN:  
31 Q. It's titled Influence of the Lawyers. Would  
32 you read that to yourself.

21383

1 When did you first find out about the Policy  
2 Committee of lawyers?  
3 A. If such a thing existed, right now.  
4 Q. Right now, at this moment.  
5 MR. RUSS HERMAN:  
6 Let's turn the page, Carl. Would you  
7 highlight the first two sentences that  
8 begin, "This committee is extremely  
9 powerful"? Would you enlarge that,  
10 please?  
11 BY MR. RUSS HERMAN:  
12 Q. Did you know that when you went to work for  
13 Philip Morris, that a committee of lawyers was  
14 determining the policy for research and public  
15 relations?  
16 A. No, I did not, nor did we act that way  
17 either. We did what we thought was the right thing  
18 to do, we as researchers within R&D.  
19 Q. Including Dr. Osdene; correct?  
20 A. Dr. Osdene was the director within R&D.  
21 Q. Okay.  
22 MR. RUSS HERMAN:  
23 Carl, go above that. Let's see who  
24 was on this committee. Could you enlarge  
25 that?  
26 BY MR. RUSS HERMAN:  
27 Q. Does your copy show an attorney from  
28 Lorillard, an attorney from Brown & Williamson, an  
29 attorney from Philip Morris, American Tobacco,  
30 Reynolds, L&M; correct?  
31 A. These people may be attorneys. I don't

32 know. I have no reason to think they are or not.

21384

1 Q. They come under the heading Policy Committee  
2 of lawyers on the prior page.

3 All right. Let's look at the sentence right  
4 above the next list.

5 MR. RUSS HERMAN:

6 Can you enlarge that, Carl?

7 BY MR. RUSS HERMAN:

8 Q. Another committee of lawyers called the Ad  
9 Hoc Group. Were you aware of that group when you  
10 went to work for Philip Morris?

11 A. No, sir, I was not.

12 Q. Were you aware of it before today?

13 A. No, sir, I was not.

14 Q. Let's look at this list. Let's see what  
15 lawyers or for whom -- can you blow that up,  
16 please? Again, someone from Philip Morris, a lawyer  
17 from Philip Morris was chairman; there was American  
18 Tobacco Company; RJR; one lawyer represented  
19 evidently, according to this, both RJR and Brown &  
20 Williamson; Lorillard; L&M; and someone else from  
21 Philip Morris. Correct?

22 A. It does say that, yes.

23 Q. All right. Now, if you would -- and you  
24 weren't aware of that committee of lawyers either  
25 working on research and public relations policy,  
26 were you?

27 A. No. Just a reminder, I didn't come until I  
28 guess eight years after this, right.

29 Q. Listen, I don't fault you for not knowing;  
30 okay?

31 Now, it talks -- were you aware that the  
32 Tobacco Institute had lobbyists that they paid in

21385

1 Washington to deal with any government bodies, that  
2 the Tobacco Institute did?

3 A. I don't know what the responsibility -- I'm  
4 sorry, I don't know what the responsibilities of the  
5 Tobacco Institute were.

6 Q. No one ever told you?

7 A. No.

8 Q. All right.

9 MR. RUSS HERMAN:

10 Let's go then to, Carl, if you would,  
11 the second paragraph from the bottom. And  
12 would you highlight on that same page,  
13 page 32, the first two sentences?

14 MR. GAY:

15 I have an objection before we do  
16 that, if I may approach, Your Honor?

17 THE COURT:

18 You may approach.

19 (At sidebar:)

20 MR. GAY:

21 I have two objections, Your Honor.

22 This is a document the witness has  
23 said now at least a number of times he  
24 knows nothing about. It was some document  
25 that he can't identify, that was written  
26 eight years before he even was employed  
27 with the company.

28 There is no foundation to cover with

29           this witness with this document. The  
30           document speaks for itself.

31           Secondly, Mr. Herman is now asking  
32           about lobbying activities, which are

21386

1           perfectly legitimate activities and are in  
2           fact protected under the Knorr-Pennington  
3           document.

4           That's my two objections. I don't  
5           think -- I mean, he can certainly put the  
6           document in evidence, which it's in  
7           evidence. But why question the witness  
8           who has no information about this, doesn't  
9           know anything about the document?

10          MR. WITTMANN:

11          That was basically my objection too.

12          MR. RUSS HERMAN:

13          The code says I can cross-examine  
14          particularly an expert on any relevant  
15          matter, number one.

16          Number two, we are entitled to know  
17          what he knew and what he doesn't know.

18          THE COURT:

19          The objections are overruled. Next  
20          question, please.

21          (In open court:)

22          MR. RUSS HERMAN:

23          This is page number 32, and, Carl,  
24          the fourth paragraph that begins, "The  
25          direction of PR policy."

26          Would you just -- Carl, if you would,  
27          just highlight the first two lines. And  
28          let's leave it up there so the witness has  
29          the whole thing and everybody can see the  
30          whole thing.

31          Just enlarge the whole thing, and  
32          then give me the first two sentences.

21387

1           I'm sorry, I wasn't very clear. If  
2           you would just enlarge the whole paragraph  
3           so everybody can see it in context.

4           Now, would you just give me the first  
5           four lines and enlarge those? That's it.

6           Thank you.

7 BY MR. RUSS HERMAN:

8 Q.       Did you understand when you went to work for  
9 Philip Morris that the lawyers wanted to get  
10 statements from scientists attacking the Surgeon  
11 General's report and supporting evidence?

12 A.       No, I did not. And if it did exist -- and I  
13 don't know if it did or didn't -- it didn't affect  
14 the way I did my work.

15 Q.       Yes, sir.

16           MR. RUSS HERMAN:

17           Thank you, Carl.

18 BY MR. RUSS HERMAN:

19 Q.       Do you know who Dr. Alton Ochsner was?

20 A.       I'm sorry, who?

21 Q.       Dr. Alton Ochsner?

22 A.       Never heard the name that I recall, no.

23 Q.       Did you ever hear or read the statement in  
24 documents or was it talked about within  
25 Philip Morris of how the Tobacco Institute or its

26 predecessor made attacks on doctors who said that  
27 cigarette smoking caused cancer?

28 A. Never heard it, no.

29 Q. Do you have 3151 still in front of you, sir,  
30 the 1964 document we were just looking at?

31 A. The 1964 October document?

32 Q. Yes. It's the one I was just asking you

21388

1 about.

2 A. Yes.

3 Q. I apologize to you, there was another matter  
4 I wanted to ask you about.

5 If you would turn to page 31?

6 MR. RUSS HERMAN:

7 Carl, could we put 31 on the screen?

8 May we publish?

9 THE COURT:

10 You may publish it.

11 BY MR. RUSS HERMAN:

12 Q. Now, before today, particularly after you  
13 began testifying, you had heard about the Tobacco  
14 Institute, hadn't you?

15 A. I did know about it, yes.

16 Q. And you knew that it was a creature or an  
17 organization created and funded by the various  
18 tobacco companies, correct, including your own?

19 MR. GAY:

20 Objection, repetitive. Repetitive.

21 MR. RUSS HERMAN:

22 Okay, I will ask another question.

23 Don't answer that.

24 BY MR. RUSS HERMAN:

25 Q. Let's put up the first paragraph and the  
26 title on Exhibit 3151. Take your time and read  
27 that.

28 My question is did anyone at Philip Morris or  
29 anyone representing Philip Morris ever explain to  
30 you or give you the impression that the Tobacco  
31 Institute was a voice at the end of the telephone  
32 line directed by lawyers, and that the Tobacco

21389

1 Institute would speak only when and as it was  
2 directed?

3 A. No.

4 Q. Do you know whether the Tobacco Institute  
5 published or directed information that there was a  
6 continuing controversy as to smoking and its cause  
7 of cancer and other diseases?

8 A. I'm not aware of that publication.

9 Q. Now, I want to move to another issue. Do you  
10 recall yesterday on the organizational chart that  
11 Dr. Wakeham at Philip Morris was at one time a  
12 senior vice president in charge of research, or a  
13 vice president in charge of research?

14 A. Yes, vice president in charge of research.

15 Q. Was he still there when you went to work?

16 A. Yes, he was.

17 Q. Did he go over with you the early reports on  
18 the number of carcinogens that there were in  
19 cigarette smoke, potentially carcinogenic and tumor  
20 causing, mutation causing, that he had written about  
21 in 1961?

22 A. He didn't personally do that, no.

23 Q. Did you ever read that document?  
24 A. I have read the document.  
25 Q. You know that there were a number, even in  
26 1961, of carcinogens and toxins that had been  
27 identified in Philip Morris cigarette smoke; isn't  
28 that correct?  
29 A. There were a number of carcinogens identified  
30 by -- and published in the scientific literature  
31 maybe even before '61, yes.  
32 Q. So Dr. Wakeham and Dr. Beverly when they were

21390

1 reporting in the early '60s about all the  
2 carcinogens and toxins in cigarette smoke, they had  
3 known about that years before they had reported it?  
4 A. I don't know what they knew. All I was  
5 telling you is that data is published in the open  
6 literature prior to the 1960 report, I think.  
7 Q. Can you tell me one single publication in  
8 Louisiana in the '60s made available to smokers  
9 between the ages of twelve and eighteen that  
10 describe what a nitrosamine was?

11 A. I don't know of any publications.

12 Q. Or that there was arsenic?

13 A. I don't know of any publications that  
14 described that to those people.

15 Q. Or that there was hydrogen cyanide?

16 A. Again, I don't know what was published. But  
17 if people in Louisiana were like the people in  
18 Georgia where I was at that time, I guess I was about  
19 those ages, a little bit older, I knew smoking was a  
20 very dangerous thing to do, I know it had a lot of  
21 those compounds in it.

22 But I don't know what anybody in Louisiana  
23 knew.

24 Q. You knew at twelve years old there was  
25 hydrogen cyanide in cigarette smoke?

26 A. I didn't say that. I said I knew there was  
27 toxic chemicals in it, that it was dangerous.

28 Q. Did you know -- you started smoking at age  
29 15?

30 A. No, sir. I was older than 15.

31 Q. You were older than 15. And you knew about  
32 nitrogen oxides in cigarette smoke?

21391

1 A. No, I don't think so. I just -- all I knew  
2 was what my teachers and what my parents told me,  
3 that it was a very dangerous thing to do, and that  
4 cigarette smoke contained compounds, chemicals that  
5 would harm you.

6 Q. Did you know that there was urea?

7 A. Same answer. I don't know if I did know.

8 Q. As an analytical chemist, what is hydrogen  
9 cyanide?

10 A. Hydrogen cyanide, as an analytical chemist,  
11 is a compound that has both hydrogen and carbon on  
12 it and nitrogen.

13 Q. And what does it do? You are just exposed to  
14 hydrogen cyanide, what does it do to you?

15 A. It smells like bitter almonds. It is a  
16 poison.

17 Q. And nicotine is a poison, isn't it?

18 A. Nicotine is a poison, yes.

19 Q. What is your definition of toxin?

20 A. In simple terms, it's a poison under certain  
21 circumstances.

22 Q. Do you have any evidence that folks in  
23 Louisiana at the average age they started smoking,  
24 between fourteen and fourteen and a half, knew what  
25 a PAH was?

26 A. I don't have any evidence that they did, no.

27 Q. Do you have any evidence that anyone anywhere  
28 that began smoking at the average age of fourteen,  
29 fourteen and a half, knew what PAH was?

30 A. Today they might. I don't know what's being  
31 taught in school. I know that it's more complete  
32 nowadays than it was when I was in school.

21392

1 So I assume that the teachers talk about  
2 those things.

3 Q. That's an assumption on your part?

4 A. I just said it was, yes.

5 Q. Not a fact that you know?

6 A. No, sir. All I know is what my kids came  
7 home talking about from their school, and they  
8 talked about all those compounds. Not all of them,  
9 but they talked about a lot of them when they came  
10 home from school.

11 Q. In cigarette smoke?

12 A. Yes.

13 Q. How old are your children?

14 A. My youngest is 20-something. My wife gets on  
15 me all the time about not remembering ages.

16 I have got three daughters. One is in her  
17 mid to late 30s, and the youngest is in her -- she  
18 will turn 30 next year, I guess. She's 29.

19 Q. And where were they going to school when they  
20 heard that there were PAHs in cigarette smoke?

21 A. In Richmond, Virginia.

22 I didn't say necessarily PAHs. They came  
23 home with a number of -- talking about a number of  
24 toxic compounds that were in cigarette smoke, trying  
25 to get me to stop at the time.

26 Q. But Richmond, Virginia, is where  
27 Philip Morris has all of its research employees;  
28 correct?

29 A. That is correct.

30 Q. And in Richmond, Virginia, Philip Morris is  
31 supplying things to those schools where your kids  
32 were educated; isn't that true?

21393

1 A. I don't know what you mean by supplying  
2 things.

3 Q. We will -- okay.

4 Now, at any rate, I want to get back, in  
5 1961, Doctor, and in 1962, Dr. Beverly and  
6 Dr. Wakeham, who were vice presidents in charge of  
7 research, were reporting a significant number of  
8 cancer-causing chemicals and disease-causing  
9 chemicals in cigarette smoke; correct?

10 A. Correct.

11 Q. Now, you had indicated to me that before you  
12 became a testifier, you didn't know about documents  
13 being destroyed or shredded; correct?

14 A. I didn't know about them before becoming a  
15 testifier.

16 The reason I didn't know about them is we

17 didn't destroy them when I was there. People around  
18 me didn't destroy them, I didn't destroy them. I  
19 never knew of anybody to destroy them.

20 It was not our policy to destroy documents.

21 The policy was to keep them.

22 Q. Exhibit No. 3023, admitted during the  
23 testimony of the president of Philip Morris,  
24 Mr. Bible, on February 13th, '03. When you were  
25 preparing to give testimony here, did anybody show  
26 you the document I'm about to hand you, Exhibit  
27 3023?

28 A. Yes, it has been shown to me.

29 MR. RUSS HERMAN:

30 Would you put it on the screen -- it  
31 is on the screen.

32 Your Honor, I would like to publish.

21394

1 It's already been admitted.

2 THE COURT:

3 No objection, I presume?

4 MR. GAY:

5 No objection.

6 THE COURT:

7 You may publish.

8 BY MR. RUSS HERMAN:

9 Q. The document has been identified also as  
10 having been written by Dr. Osdene. Do you remember  
11 Dr. Osdene from the chart?

12 A. I remember Dr. Osdene, yes.

13 Q. And he was the director of research at  
14 Philip Morris where you worked?

15 A. Correct.

16 Q. Let's enlarge the first line. It says: Ship  
17 all documents to Cologne by Tom.

18 A. I believe that's what it says, yes.

19 Q. Let's go to number three, let's enlarge it:  
20 Okay to phone and telex, parens, these will be  
21 destroyed, parens closed.

22 Is that what it says?

23 A. I believe that's a correct reading, yes.

24 Q. Let's go to number six: If important letters  
25 have to be sent, please send to home. I will act on  
them and destroy.

27 Do you see that?

28 A. It says what it says, and it's completely  
29 contrary to anything I knew of or people around me  
30 did.

31 Q. I'm not blaming you; okay? You didn't know  
32 about this, did you?

21395

1 MR. GAY:

2 Objection. Asked and answered, and  
3 commentary by counsel.

4 THE COURT:

5 Sustained. Next question, please.

6 BY MR. RUSS HERMAN:

7 Q. Do you see the word INBIFO there,  
8 I-N-B-I-F-O?

9 A. Yes.

10 Q. Now, the documents that were being shipped  
11 over were going to INBIFO, were they not? Isn't  
12 that what Philip Morris' facility was in Cologne?

13 A. We did have a facility in Cologne, but I

14 can't say this is correct.  
15 Q. Now, did you ever question -- when did you  
16 first find out about this document?  
17 A. I found out about it in the context of  
18 litigation. Which case I was in when I found out  
19 about it, I don't recall.  
20 Q. How many years ago?  
21 A. Probably three or four years ago.  
22 Q. Did you talk to Dr. Osdene about it?  
23 A. No, I have not.  
24 Q. Now, Mr. Gay asked you about a dummy mailing  
25 address. There was actually a dummy mailing address  
26 eventually set up, wasn't there?  
27 A. Not to my knowledge, no.

28 MR. RUSS HERMAN:

29 Let's look at 3459, also the  
30 president of Philip Morris, Mr. Bible.  
31 May I approach, Your Honor?  
32 THE COURT:

21396

1 Yes.  
2 BY MR. RUSS HERMAN:  
3 Q. Here is my copy, sir.  
4 A. Thank you.  
5 Q. You are welcome.  
6 It has Mr. Seligman's name on it; is that  
7 correct?  
8 A. Yes, it does.  
9 Q. It's a 1977 letter, while you were employed  
10 in research at Philip Morris; correct?  
11 A. Yes, I was.  
12 Q. Have you seen this before?  
13 A. Again, the same way as the other, in the  
14 context of litigation only.  
15 Q. No one ever showed it to you before you  
16 became a testifier; correct?  
17 A. I don't remember seeing it before.  
18 Q. And the only way you got to see it is when  
19 you were questioned by a lawyer about it, is that  
20 right, in a trial or a deposition?  
21 A. I may have been shown it in preparation for a  
22 deposition or a trial.  
23 Q. I see.  
24 A. I don't recall the context of seeing it.  
25 Q. I see. You weren't shown it by anyone,  
26 though, and didn't discover it before you were a  
27 testifier, did you?  
28 A. No, I did not.  
29 Q. Who is Dr. Max Hausermann?  
30 A. Dr. Hausermann was vice president of research  
31 and development in Richmond for a while. I don't  
32 know his position in '77.

21397

1 Q. Didn't he -- wasn't he elevated to New York  
2 at one time, become part of the New York managing  
3 team?  
4 A. I don't recall him being in New York, but --  
5 Q. Okay. It's signed -- the second page, it's  
6 from Mr. Seligman?  
7 A. In fact, I don't think he ever went to  
8 New York.  
9 Q. Okay. Signed by Mr. Seligman?  
10 A. It has a signature block for him. I don't

11 know if that's his signature.

12 Q. Okay.

13 MR. RUSS HERMAN:

14 Now, Your Honor, I would like to  
15 publish Exhibit No. 3459. It's already in  
16 evidence.

17 THE COURT:

18 No objection, I presume?

19 MR. GAY:

20 No objection, Your Honor.

21 THE COURT:

22 You may publish it.

23 MR. RUSS HERMAN:

24 Would you highlight just the top part  
25 with the date and Dr. Max Hausermann's  
26 name under where it says personal and  
27 confidential?

28 Okay. Let's go to the last sentence  
29 of the first paragraph. Let's give the  
30 whole first paragraph and then go to the  
31 last sentence so we have it in context.

32 I'm sorry, the one above it.

21398

1 BY MR. RUSS HERMAN:

2 Q. By the way, it says this is in March of '77.  
3 They are talking about pesticide residue. Do you  
4 see that?

5 A. Yes, I see that.

6 Q. Isn't it true that Philip Morris to this day  
7 does not make routine tests of pesticide residue on  
8 the tobacco that it imports from out of this  
9 country?

10 A. That's all done by the U.S. Department of  
11 Agriculture.

12 Q. Sir, if it is done by the U.S. Department of  
13 Agriculture, fine. Philip Morris does not routinely  
14 test itself for pesticide residue; is that correct?

15 A. I think that's correct, because it's done by  
16 the U.S. Department of Agriculture.

17 Q. Now, do you see the last sentence?

18 We have gone to great pains to  
19 eliminate any written contact with INBIFO,  
20 and I would like to maintain this  
21 structure.

22 A. I see that, yes.

23 Q. Were you aware of that policy in 1977 when  
24 you were working in the Research Department?

25 A. If the policy existed, I was not aware of it,  
26 no.

27 Q. Let's go to the next paragraph. Do you see  
28 where it says:

29 If this procedure is unacceptable to  
30 you, perhaps we should consider a "dummy"  
31 mailing address in Koln, K-o-l-n, for the  
32 receipt of samples.

21399

1 Do you see that?

2 A. Yes.

3 Q. Now, Koln, K-o-l-n, is not Cologne where  
4 INBIFO is located; is that correct?

5 A. You are calling to question my geography,  
6 remembering -- I thought Cologne and -- maybe it's  
7 not the same. I think it is the same place.

8 Q. One is Swiss -- he tells me they are the  
9 same, and I don't want to mislead you or anybody  
10 else.

11 A. I am pretty darn sure they are the same.

12 Q. One is Swiss and one is German. Thank you.  
13 MR. RUSS HERMAN:  
14 Thank you, Dan.

15 BY MR. RUSS HERMAN:

16 Q. A dummy mailing address, you don't have any  
17 knowledge that a dummy mailing address was set up;  
18 correct?

19 A. To my knowledge it wasn't.

20 MR. GAY:  
21 Objection. Asked and answered.

22 MR. RUSS HERMAN:  
23 Now, do you have any reason --  
24 THE COURT:

25 I have an objection.

26 The objection is moot because the  
27 question was answered. Next question,  
28 please.

29 BY MR. RUSS HERMAN:

30 Q. The written analytical data will  
31 still have to be routed through FTR if we  
32 are to avoid direct contact with INBIFO

21400

1 and Philip Morris U.S.A.

2 Were you aware of any policy to avoid -- for  
3 the research department to avoid direct contact with  
4 INBIFO or Philip Morris U.S.A.?

5 A. No.

6 Q. Thank you very much.

7 Now, were you aware in 1977 that certain  
8 people in charge of research at Richmond, Virginia,  
9 where you worked, were giving instructions that if  
10 research didn't turn out the way they liked it, it  
11 should, quote, be buried?

12 A. No.

13 Q. And again, you first became aware of that,  
14 sir, when you started to testify as a testifier;  
15 correct?

16 A. That's right. Because we didn't behave that  
17 way when I was at Philip Morris. We didn't bury  
18 research. And I don't think research was ever  
19 buried.

20 MR. RUSS HERMAN:

21 Your Honor, this is a good time to  
22 take the break.

23 THE COURT:

24 We will recess until 11:00.

25 (In open court without a jury  
26 present:)

27 THE COURT:

28 The jury has left the courtroom.  
29 Anything for the record by plaintiffs  
30 counsel?

31 MR. RUSS HERMAN:

32 No, Your Honor.

21401

1 THE COURT:  
2 Defense counsel?  
3 MR. GAY:  
4 No, Your Honor.

5 MR. WITTMANN:  
6 No, Your Honor.  
7 THE COURT:  
8 We will recess until 11:00.  
9 (A recess is taken at 10:46 a.m.)  
10 -- - - -  
11 (In open court with a jury present at  
12 11:05 a.m.:)  
13 THE COURT:  
14 Mr. Herman?  
15 MR. RUSS HERMAN:  
16 Yes, thank you, Your Honor. Good  
17 afternoon -- still good morning, folks.  
18 BY MR. RUSS HERMAN:  
19 Q. Dr. Whidby, I asked you about pesticides, and  
20 you said the U.S.A. tested for that; right?  
21 A. No, I said the USDA did.  
22 Q. The USDA?  
23 A. The Department of Agriculture.  
24 Q. They didn't start doing that until 1986;  
25 isn't that correct?  
26 A. I don't know the exact year they started. I  
27 won't argue with you.  
28 Q. And when they started, they only tested for  
29 those things that the EPA -- that is, those  
30 pesticides that the EPA said they should test for;  
31 correct?  
32 A. I don't know their directive.

21402

1 Q. And as a matter of fact, in your report, the  
2 only article you mention is a speech you gave based  
3 upon Dr. Dietrich Hoffmann's journal article,  
4 correct, "The Changing Cigarette"? It's listed as  
5 an exhibit, actually, by Philip Morris. Are you  
6 aware of that?  
7 A. I'm confused about the question. I'm sorry.  
8 Q. Okay, let me back up. Who is Dr. Dietrich  
9 Hoffmann?  
10 A. Dietrich Hoffmann is a chemist in the public  
11 health community who has made a specialty over the  
12 years of evaluating constituents, chemicals in  
13 cigarette smoke.  
14 Q. Well respected, is he not?  
15 A. He's very well respected, yes.  
16 Q. And he wrote an article called "The Changing  
17 Cigarette, 1950 to 1995," published in the Journal  
18 of Toxicology and Environmental Health. Are you  
19 familiar with that?  
20 A. I am familiar with the publication, yes.  
21 Q. And somewhere in your report, I thought that  
22 I read that you went to Coresta and gave a paper  
23 based upon Dr. Hoffmann's work?  
24 A. We can look at the report. I don't recall  
25 that.  
26 Q. All right. I'm not going to delay now to do  
27 that. We will do that when we come back from lunch  
28 because I want to move on.  
29 MR. RUSS HERMAN:  
30 Would you please put on the screen --  
31 and I will hand you my copy, sir --  
32 Plaintiffs' Exhibit 0107. It has not been  
21403  
1 admitted in evidence yet, Your Honor.

2 May I approach, Your Honor?  
3 THE COURT:  
4 Yes.  
5 THE WITNESS:  
6 Thank you.

7 BY MR. RUSS HERMAN:

8 Q. Now, do you recognize that as the  
9 authoritative article published by Dr. Dietrich  
10 Hoffmann?

11 A. It is a publication by Dr. Hoffmann, yes.

12 Q. And it's in a peer-reviewed journal, is it  
13 not?

14 A. Yes.

15 MR. RUSS HERMAN:

16 Now, Your Honor, I would like to  
17 offer and introduce into evidence  
18 Dr. Hoffmann's article.

19 MR. GAY:

20 No objection, Your Honor.

21 THE COURT:

22 You may -- it will be received in  
23 evidence.

24 BY MR. RUSS HERMAN:

25 Q. Now, I do want to clear one thing up. I got  
26 some help. You didn't mention this article in your  
27 report. You mention it -- or the defendants put  
28 it -- footnoted it in connection with a  
29 demonstrative that was submitted.

30 A. That is correct, yes.

31 MR. RUSS HERMAN:

32 Now, just highlight, if you would,

21404

1 Carl, first the title of the article.

2 Would you, please, Carl go to page  
3 351? And I'm going to hand you another  
4 copy.

5 And in order to facilitate this,  
6 Carl, if that's going to take a while, I  
7 will just have Dr. Whidby, if he would,  
8 please, read the paragraph that I have  
9 boxed in red to the jury.

10 A. Just so I'm being clear, this document that I  
11 have in front of me, the one you first handed me,  
12 does have some marginalia in it and some  
13 underlining.

14 Q. I'm not asking you to do that.

15 A. Which was not part of the original document.

16 Q. The marginalia is not.

17 A. Right.

18 Q. Yes, sir. That's why I'm only asking you to  
19 read the part of the report that's in the red box.

20 A. Okay.

21 Q. Would you read it to the jury?

22 A. A number of pesticides continue to be  
23 used on tobacco. These include  
24 insecticides, fumigants and growth  
25 regulators -- reference, Sheets, 1991 --  
26 with only limited knowledge about the  
27 residues of such agents on cigarette  
28 tobacco and about their fate during  
29 smoking.

30 Q. Okay. My question is given the -- do you  
31 agree that there is a limited knowledge as of the

32 time that this article was written about the residue  
21405

1 which pesticides leave on the tobacco?

2 A. I don't have any reason to disagree with  
3 Dr. Hoffmann.

4 Q. And Philip Morris does not routinely test for  
5 that residue in its cigarette products. Am I  
6 correct?

7 A. That's correct.

8 Q. Now, I want to go to another issue of a  
9 document that hasn't yet been introduced. Sir, do  
10 you know who -- well, strike that.

11 Was not Mr. James C. Bowling a vice president  
12 of Philip Morris, Inc., in August of 1976 when you  
13 were employed at Philip Morris?

14 A. He may have been. I didn't know him at the  
15 time nor his title.

16 Q. You don't know the name?

17 A. I have known the name later on, but I didn't  
18 know what his title was at the time, nor did I know  
19 him at the time.

20 Q. Well, when you learned about his name, did  
21 you also learn that he was an executive with  
22 Philip Morris at the time you were employed there?

23 A. I don't know in what context I first learned  
24 of his name.

25 Q. Do you know whether in 1976 Dr. Bowling, as a  
26 vice president of Philip Morris, Inc., indicated  
27 that if any ingredient in tobacco smoke was found to  
28 be hazardous to human health, that we, meaning the  
29 company, would eliminate it?

30 A. I have seen documents like that or similar to  
31 that in the context of litigation, like this in a  
32 courtroom.

21406

1 Q. From 19 -- well, let me ask you this. Have  
2 all the ingredients which you know to be harmful to  
3 human health as of 1996 been eliminated from the  
4 products that you had in the marketplace from 1976  
5 to 1996?

6 A. No. But we have made substantial efforts and  
7 substantial progress in reducing those constituents,  
8 all of them.

9 The constituents come down with tar. You  
10 reduce tar, those constituents come down along with  
11 tar.

12 Q. Now, you had indicated, sir, that you knew  
13 for many people smoking was hard to quit; correct,  
14 sir?

15 A. Correct.

16 Q. Are you aware of Philip Morris research that  
17 indicates that 50 percent of all quitters resume  
18 within a month, and 70 percent of all smokers resume  
19 smoking within a year?

20 A. I don't recall that work.

21 Q. Sir, I'm going to show you that document that  
22 hasn't yet been introduced in evidence. It's marked  
23 confidential. It's Exhibit 3505. It was previously  
24 ordered redacted.

25 The first page reads Philip Morris U.S.A.  
26 Research Center, Confidential, August 18, 1978.

27 Would you take a look at that, please?

28 A. Sure.

29 Q. Thank you very much.  
30 I have handed you my copy. Does the first  
31 page, am I correct, indicate that it is from  
32 Philip Morris U.S.A. Research Center?

21407

1 A. Yes, it does.  
2 Q. Does it indicate that the date is 1978?  
3 A. It does.  
4 Q. And you were employed by Philip Morris at  
5 that time; correct?  
6 A. Yes, I was.  
7 Q. And one of the authors is W. L. Dunn;  
8 correct?  
9 A. Correct.

10 Q. And he was identified on one of the  
11 organizational charts as being in the Research  
12 Department at the time?

13 A. Yes.

14 Q. And in addition, it says it's distributed,  
15 among others, to Dr. Seligman, Dr. Wakeham,  
16 Dr. Farone, Dr. Osdene, Dr. Lilly. But it does not  
17 show you on the distribution list; correct?

18 A. I'm not on the distribution list, although  
19 there is something that says "Day Files" there.  
20 These documents when they were in the day  
21 files were passed around to researchers within R&D,  
22 and we had the opportunity to read these as they  
23 came across our desk.

24 Q. Do you recall this document?

25 A. I don't recall it specifically, no.

26 Q. All right.

27 MR. RUSS HERMAN:

28 I would like at this time, Your  
29 Honor, to offer in evidence Exhibit 3505  
30 as identified by the witness?

31 MR. GAY:

32 Object. The witness has never seen  
21408

1 it.

2 MR. RUSS HERMAN:

3 May I approach with the document?

4 THE COURT:

5 Approach the bench, please.

6 (At sidebar:)

7 THE COURT:

8 Are you making an authenticity  
9 objection?

10 MR. GAY:

11 No, sir. I just said with this  
12 witness, this document shouldn't be used.

13 THE COURT:

14 It's on cross. Overruled.

15 (In open court:)

16 THE COURT:

17 The objection is overruled. The  
18 exhibit will be received.

19 MR. RUSS HERMAN:

20 Carl, may I ask you -- Your Honor,  
21 may we publish?

22 THE COURT:

23 You may.

24 MR. RUSS HERMAN:

25 Would you put up the first page on

26 the screen? Would you put it up?  
27 Carl, would you blow up the first  
28 half of it?  
29 Carl, would you now blow up the  
30 second half of it?  
31 BY MR. RUSS HERMAN:  
32 Q. This shows all the individuals that this was

21409

1 to be distributed to; correct?  
2 A. As individuals, yes, as we said before.  
3 Q. Now, you see -- I think I have a yellow  
4 tabbed page on my copy, do I not?  
5 A. I believe you have a couple of them. The  
6 first one?  
7 Q. Well, I better hand you this one, because I  
8 can't ask you the question because I don't have my  
9 own.  
10 Thank you very much. Here you are, sir.  
11 A. All right.  
12 Q. Would you please first -- let's go to page  
13 nine at the top. It's marked confidential, and then  
14 there is a redacted portion.  
15 A. We have two page nines apparently. I don't  
16 see that.  
17 Q. Let's take that off the screen, because your  
18 copy doesn't have -- what's on the screen is not  
19 redacted.

20 Do you see at the bottom of page nine, sir, a  
21 sentence that says: It's difficult to interpret  
22 these numbers?

23 A. I see such a sentence, yes.  
24 Q. Would you read that sentence to the jury,  
25 please?

26 A. It's difficult to interpret these  
27 numbers because experience with people who  
28 quit, in quotes, suggests that most would-  
29 be quitters resume after a while.

30 Q. Would you read the next sentence?  
31 A. Hunt and I guess Matarazzo show data  
32 suggesting that 50 percent of quitters

21410

1 resume within a month and 70 percent  
2 within a year.

3 Q. You do agree that it's difficult to quit. Do  
4 you agree the earlier someone quits, the better it  
5 is?

6 A. It looks like the more often.

7 Q. Yes, sir. My question is do you agree that  
8 the earlier someone quits, the better off they are?

9 A. I don't disagree with that, but I don't know.

10 Q. Okay. Do you disagree with the earlier  
11 someone finds out they have lung cancer, the earlier  
12 they can do something about it?

13 MR. GAY:

14 Objection. Beyond qualifications,  
15 Your Honor.

16 THE COURT:

17 Sustained.

18 BY MR. RUSS HERMAN:

19 Q. Let's look at page 15.

20 MR. RUSS HERMAN:

21 May we publish, Your Honor?

22 THE COURT:

23 You may publish it.  
24 MR. RUSS HERMAN:  
25 Carl, would you blow up the paragraph  
26 "Nicotine as Dr. Gullotta and Dr. Levy  
27 pointed out"?  
28 All right. Could you enlarge the  
29 first two sentences?  
30 BY MR. RUSS HERMAN:  
31 Q. Do you see that in the copy you have before  
32 you, sir?

21411

1 A. Yes, sir, I do.  
2 Q. And this is at page 15 of Exhibit 3505.  
3 Do you recall -- you don't recall actually  
4 reading this report, do you?  
5 A. I don't recall. I also said I didn't -- I  
6 don't recall, I don't know whether I did or didn't.  
7 Q. Did you ever discuss in the '70s with  
8 Dr. Levy and Dr. Gullotta nicotine as a reinforcer  
9 or as causing an addiction?  
10 A. I may have. I don't remember the specific  
11 discussion.  
12 Q. Well, since you have become a testifier, have  
13 you discussed that with either of them?  
14 A. No, I have not.  
15 Q. Thank you, sir.  
16 Now, as an analytical chemist and an expert  
17 witness, there are a number of ways in which  
18 cigarettes are not regulated by the government;  
19 isn't that true?  
20 A. I suppose so. They can probably dream up  
21 some more ways to regulate them.  
22 Q. Well, during your tenure, isn't it true that  
23 the FDA does not regulate cigarettes and the  
24 nicotine in cigarettes; isn't that true?  
25 A. That is true, the FDA does not.  
26 Q. That's the Food and Drug Administration;  
27 correct?  
28 A. Correct.  
29 Q. And that the Federal Hazardous Substances  
30 Labeling Act does not regulate cigarettes or the  
31 hazardous chemicals in cigarettes; isn't that  
32 correct?

21412

1 A. I won't argue with you. I don't know.  
2 Q. Do you know what a material data safety sheet  
3 is?  
4 A. Yes.  
5 Q. Or a material safety data sheet?  
6 A. Yes.  
7 Q. And that is a sheet which some government  
8 agencies require the manufacturer of products to  
9 list specifically the hazardous chemicals and  
10 compounds in their products and describe them; isn't  
11 that correct?  
12 MR. LONG:  
13 Objection, Your Honor. May we  
14 approach?  
15 THE COURT:  
16 Yes.  
17 (At sidebar: )  
18 MR. LONG:  
19 Objection on two grounds.

20           He's talking about listing hazards,  
21       he's talking about warning issues.

22           Number one, there is no warning claim  
23       in the case.

24           But number two, if there is a warning  
25       claim, it's clearly preempted by the  
26       Federal Labeling Act, which sets forth  
27       what the companies must put out  
28       determining the hazards of their  
29       products.

30           The question is preempted, and there  
31       is no failure to warn claim in the case.

32       MR. RUSS HERMAN:

21413

1           This question isn't preempted. What  
2       I'm establishing is the ways in which the  
3       cigarette companies are not regulated, not  
4       the ways in which they are regulated.

5           There is no preemption issue here.  
6       There could only be preemption if they  
7       were regulated.

8       MR. LONG:

9           Your Honor, the jurisdiction over the  
10       warnings lies with the Labeling Act.  
11       Everything else is preempted. That's the  
12       argument.

13       MR. GAY:

14           The point is he can't do through the  
15       back door what he can't do through the  
16       front door. He's trying to get it through  
17       the back door by this method.

18       MR. RUSS HERMAN:

19           I have no question about warnings.  
20       I'm establishing they are not required to  
21       list the hazardous chemicals and compounds  
22       on MSDS sheets.

23       MR. LONG:

24           Listing hazards is a warning.

25       THE COURT:

26           The objection is overruled.

27       (In open court:)

28       THE COURT:

29           The objection is overruled. Answer  
30       the question if you are able to.

31           Do you remember the question or do  
32       you want me to read it to you?

21414

1       THE WITNESS:

2       No, sir. Please.

3       THE COURT:

4           The question is: And that is a sheet  
5       which some government agencies require the  
6       manufacturer of products to list  
7       specifically the hazardous chemicals and  
8       compounds in their products and describe  
9       them; isn't that correct?

10      A. Yes.

11      Q. And cigarette companies don't have to do  
12       that?

13      A. We don't have MSDS sheets for our cigarettes,  
14       no.

15      Q. And you don't have to comply and you are not  
16       governed by -- cigarette companies are not governed

17 by the 1970 Controlled Substances Act; correct?

18 A. Can I clarify my answer to the previous  
19 question?

20 If we manufacture a chemical or whatever, we  
21 are under the same guidelines as everybody else, and  
22 we have published MSDS sheets for some of the things  
23 that we have done.

24 But my answer stands also true for  
25 cigarettes, we don't put those for cigarettes.

26 Q. Thank you.

27 A. And you did some work for the Consumer  
28 Products Safety Act at some time; correct?

29 Commission; correct?

30 A. I worked with the commission, yes.

31 Q. And that was established in 1972, that  
32 commission; correct?

21415

1 A. I don't know when it was established.

2 Q. Well --

3 A. I won't argue with you on the date.

4 Q. The Consumer Products Safety Act doesn't  
5 regulate cigarettes in any way, does it?

6 A. No, not that I know of.

7 Q. All right. Thank you, sir.

8 Now, Mr. Gay yesterday said it's been  
9 contended that the cigarette companies add nicotine  
10 to the cigarettes; okay? Do you recall that  
11 question?

12 A. Yes.

13 Q. That's not -- are you aware that the  
14 contention is that nicotine in cigarettes is  
15 manipulated?

16 A. I don't know what you mean by that.

17 Q. What do you understand the word manipulation  
18 to mean?

19 A. Change, adjusted.

20 Q. Adjust up or down; isn't that a fair  
21 definition of the word manipulation?

22 A. It could be, yes. I won't argue with that.

23 Q. And you do know, sir, that for the entire  
24 time that you were at Philip Morris in research, the  
25 amount of nicotine in Philip Morris cigarettes was  
26 manipulated up or down in order to find the minimum  
27 dose which would keep someone hooked?

28 A. That's totally untrue. What we did was to --  
29 this is excluding the work that we did on making the  
30 denicotinized cigarette. We did try to remove all  
31 the nicotine from that cigarette. We got 97 percent  
32 of it out, not 100 percent.

21416

1 But on the other hand, with our other  
2 cigarettes, what we do is to try to reduce the tar  
3 in the cigarettes. And when we reduce the tar, the  
4 nicotine goes along with it and it goes down.

5 We don't add nicotine and we don't adjust it  
6 up or down other than by reducing the tar.

7 Q. Sir, isn't it true since the late 1950s, the  
8 mid '60s, that folks at Philip Morris, like  
9 Mr. Tamol, were attempting to find the minimum dose  
10 of nicotine that would keep someone hooked?

11 A. I don't believe that to be the case. I don't  
12 think it was. I'm sure it wasn't.

13 Mr. Tamol is an engineer, he's not a

14 biologist.  
15 Q. You didn't see any documents like that?  
16 A. I have seen documents similar to that, I  
17 guess, in preparation for litigation, but only in  
18 that context.

19 Q. You can manipulate nicotine down if you still  
20 found the level that would keep someone reinforced  
21 or addicted; isn't that true?

22 A. I don't know that to be the truth.

23 Q. Sir, wasn't one of the reasons that these  
24 companies -- you say you all were studying each  
25 other -- was studying ammonia because they concluded  
26 that the addition of ammonia in Philip Morris  
27 cigarettes boosted the nicotine level into free  
28 nicotine?

29 MR. GAY:

30 Objection. Vague.

31 THE COURT:

32 Overruled. Answer the question, if  
21417

1 you are able to.

2 A. You know, I don't know what all of our  
3 competitors concluded. But I can tell you, we  
4 didn't do that.

5 Q. Well, you know who Dr. Townsend is at R. J.  
6 Reynolds, don't you?

7 A. Yes, I do.

8 Q. And you read his testimony, so you know he  
9 testified here?

10 A. I read part of his testimony, yes.

11 Q. Are you aware of the demonstrative exhibit  
12 that he put up that showed that the nicotine levels  
13 really didn't vary after the Surgeon General report  
14 suggested that nicotine and tar be reduced?

15 MR. WITTMANN:

16 Objection, Your Honor. May we  
17 approach?

18 MR. GAY:

19 Objection.

20 THE COURT:

21 Yes.

22 (At sidebar:)

23 MR. WITTMANN:

24 Mr. Herman is back to testifying  
25 again. He's not asking a question. He's  
26 reciting his representation of what the  
27 testimony was and asking the witness if  
28 he's known that fact as if it is a known  
29 fact. I think that's improper.

30 MR. RUSS HERMAN:

31 I'm laying a foundation to introduce  
32 JW-29, which is Mr. Townsend's exhibit.

21418

1 MR. WITTMANN:

2 The proper way to do it is to show  
3 him the exhibit.

4 MR. RUSS HERMAN:

5 I'm about to do that.

6 THE COURT:

7 The objection is overruled.

8 (In open court:)

9 THE COURT:

10 The objection is overruled. Do you

11 remember the question?

12 THE WITNESS:

13 No, sir, I don't.

14 THE COURT:

15 The question is: Are you aware of  
16 the demonstrative exhibit that he put up  
17 that showed that the nicotine levels  
18 really didn't vary after the Surgeon  
19 General report suggested that nicotine and  
20 tar be reduced?

21 A. I didn't see any of his demonstratives.

22 Q. Dr. Townsend's demonstrative was identified  
23 as DT-2, and one of the sources was listed as the  
24 1981 Surgeon General report, Exhibit No. 0898.

25 MR. RUSS HERMAN:

26 Now, Carl, would you put up JW-21 on  
27 the Judge's screen?

28 BY MR. RUSS HERMAN:

29 Q. Sir, what has been added to this is a red  
30 line indicating the 1981 Surgeon General's report.

31 A. Okay.

32 MR. RUSS HERMAN:

21419

1 May we publish, Your Honor?

2 THE COURT:

3 Yes.

4 BY MR. RUSS HERMAN:

5 Q. Now, this was originally put up without the  
6 red line by Dr. Townsend for tar yields from 1954 to  
7 '93. The Surgeon General report that said reduce  
8 tar and nicotine was in what year, sir?

9 A. I think it was '81.

10 Q. Where that red line is?

11 A. I won't argue with you.

12 Q. Do you see that the nicotine and tar levels  
13 according to this defendant's exhibit remain fairly  
14 constant for at least ten years?

15 A. I don't have any knowledge about this data,  
16 where it came from or whatever.

17 Q. Thank you, sir.

18 MR. RUSS HERMAN:

19 You may take that down.

20 BY MR. RUSS HERMAN:

21 Q. Now, with respect to manipulation of  
22 nicotine, isn't it true that in 1980, although Merit  
23 and Marlboro differed in the amount of nicotine  
24 delivered to a machine, the free nicotine in the  
25 smoke was nearly identical?

26 A. I think the free nicotine in smoke is nearly  
27 zero. If it's nearly zero, it's probably  
28 nonexistent, so it would be the same.

29 MR. RUSS HERMAN:

30 Let's look -- would you put Exhibit  
31 2925 up on the screen?

32 BY MR. RUSS HERMAN:

21420

1 Q. Sir, this is a Lorillard document. Have you  
2 seen this document before?

3 A. No, not other than in the context of  
4 preparation for this case.

5 Q. And in preparation for this case, did you  
6 understand that Lorillard had concluded that  
7 nicotine could be manipulated?

8 A. I did not read this document, so I don't  
9 know.

10 Q. Okay, let's go to the next one. This  
11 document is in evidence, 2011. It's a Philip Morris  
12 document dated January 4th, 1980.

13 I'm sorry, let me back up. This is a Brown &  
14 Williamson document dated 1980 comparing the free  
15 nicotine in Marlboro 85s with the free nicotine in  
16 Merit.

17 A. I have never seen this document before right  
18 now that I recall.

19 Q. Not even in preparation?

20 A. I was shown a lot of them. I don't recall  
21 this one.

22 Q. Does it indicate that the free --

23 MR. GAY:

24 Objection.

25 THE COURT:

26 Approach the bench.

27 (At sidebar: )

28 MR. GAY:

29 Your Honor, it's not our document,  
30 the man hasn't seen it. He can't  
31 establish that he's seen it. It's not  
32 proper to cross-examine him on it.

21421

1 MR. RUSS HERMAN:

2 It's already in evidence. It was put  
3 in in February.

4 He volunteered that -- well, if they  
5 were compared, it would be zero or close  
6 to zero. He's given testimony --

7 THE COURT:

8 What would be close to zero?

9 MR. RUSS HERMAN:

10 The nicotine, free nicotine in both  
11 Merit and Marlboro. And on direct he  
12 hasn't brought any documents --

13 MR. GAY:

14 Mr. Herman is speaking so the jury  
15 can hear, and I object to it.

16 THE COURT:

17 Lower your voice, please.

18 MR. RUSS HERMAN:

19 I thought my voice was low, but I  
20 will lower it even more.

21 He testified on direct that Merit was  
22 an improvement, it had less nicotine than  
23 Marlboro.

24 This document clearly demonstrates a  
25 test that shows that while the smoking  
26 machine may have measured Merit less, the  
27 actual free nicotine delivered to the  
28 smoker was about the same.

29 In addition to that, he testified on  
30 direct that he and the other folks at  
31 different companies exchanged information  
32 from time to time.

21422

1 Notwithstanding that, he can be  
2 redirected on this document. This  
3 document is in evidence. And under the  
4 code, he's an expert and can be questioned

5 on any relevant matter.

6 MR. LONG:

7 Under Article 602, which is part of  
8 the evidence code as well, he has to have  
9 personal knowledge about something if you  
10 are going to examine him about it.

11 We have got to have a foundation.  
12 There is no foundation. He's never seen  
13 the document.

14 602 says you have to have personal  
15 knowledge.

16 THE COURT:

17 I'm going to allow the question. The  
18 objection is overruled.

19 (In open court:)

20 THE COURT:

21 Answer the question, if you are able  
22 to.

23 THE WITNESS:

24 Would you read it again, please,  
25 sir?

26 THE COURT:

27 There is not a question to you.  
28 Question, Mr. Herman, please?

29 MR. RUSS HERMAN:

30 Yes. May we publish the document,  
31 Your Honor?

32 THE COURT:

21423

1 You may publish it.

2 MR. RUSS HERMAN:

3 I would now like to publish a section  
4 of the document as a demonstrative,  
5 JW-36. May I put that on the screen?

6 And may I publish it, Your Honor?

7 MR. GAY:

8 Same objection, Your Honor.

9 THE COURT:

10 Same ruling. Overruled. You may  
11 publish it.

12 BY MR. RUSS HERMAN:

13 Q. Doesn't this test indicate that the free  
14 nicotine delivered to the smoker, whether they smoke  
15 a Marlboro 85 or a Merit, is nearly identical?

16 MR. GAY:

17 Objection. May we approach?

18 THE COURT:

19 You may approach.

20 (At sidebar:)

21 MR. GAY:

22 Your Honor, I object. This is  
23 completely improper examination of a  
24 witness who cannot identify the document,  
25 does not have a foundation to testify  
26 about it, and Mr. Herman suddenly jumps to  
27 a conclusion and says isn't this a test  
28 that proves this.

29 That is a completely -- that's a huge  
30 leap without having any basis upon which  
31 to say that other than Mr. Herman's  
32 testimony.

21424

1 THE COURT:

2 This is a sophisticated witness.  
3 He's on cross. The objection is  
4 overruled.

5 (In open court:)

6 THE COURT:

7 Objection overruled. Answer the  
8 question.

9 BY MR. RUSS HERMAN:

10 Q. Let me step back. Do you see the numbers,  
11 total nicotine delivered, Marlboro 85, 1.15. Do you  
12 see that, sir?

13 A. I do see that, yes.

14 Q. And you see Merit, 0.64; correct?

15 A. I also see that.

16 Q. Don't you understand, sir, from the document  
17 that -- that is the FTC, that's the way a machine  
18 gets the nicotine; correct?

19 A. I do not understand that from the document.

20 I don't know how -- what method these people used.  
21 I don't know the people, I don't know their

22 competence to rely upon the data they are getting.  
23 The data that's in here makes no sense to me

24 whatsoever.

25 Q. Well, then let's go --

26 A. I really can't authenticate it or whatever.

27 My professional belief is this is not right,  
28 it's wrong.

29 Q. Let's go to the first page, then.

30 MR. RUSS HERMAN:

31 Carl, would you take off the  
32 demonstrative.

21425

1 Let's go to the first page. Now,  
2 would you highlight the top of it?

3 BY MR. RUSS HERMAN:

4 Q. Observation of Free Nicotine Changes in  
5 Tobacco Smoke; correct?

6 A. It does say that, yes.

7 Q. Does it say:

8 For some time, we have been aware of  
9 the relationship between smoke pH, parens,  
10 TPM --

11 That means total particulate matter; correct?

12 A. Yes, it does.

13 Q. -- parens closed, and free nicotine  
14 delivered in tobacco smoke.

15 Correct?

16 A. It says what it says, yes.

17 Q. All right. Now, let's go to the second  
18 page.

19 MR. RUSS HERMAN:

20 Carl, if you would, go to the  
21 sentence that begins on the second page,  
22 third paragraph from the bottom, "It  
23 appears."

24 BY MR. RUSS HERMAN:

25 Q. It appears that we have sufficient  
26 expertise available to, quote, build,  
27 quote, a lowered MG tar cigarette which  
28 will deliver as much "free nicotine" as a  
29 Marlboro.

30 Do you see that sentence?

31 A. I see it.

32 Q. And Marlboro was the highest selling  
21426

1 cigarette, was it not, 1980, sir?

2 A. It may have been.

3 Q. Now, it also talks -- now, a light cigarette  
4 would be a cigarette with reduced tar; correct?

5 A. Could be.

6 Q. Well, isn't that what you all meant when you  
7 were saying light cigarettes and ultralights?

8 A. Within the brand family.

9 Q. And so if you can produce a light cigarette  
10 but still have enough nicotine to keep someone --  
11 free nicotine to keep someone addicted, you could  
12 produce a light cigarette that would still have the  
13 capacity to keep someone addicted; isn't that true?

14 A. I don't know that to be true.

15 Q. Now, let's go back to page one. Do you  
16 see -- let's highlight where it says Marlboro 85,  
17 that square with Marlboro 85 and Merit.

18 Now, let's read across for Marlboro 85.

19 Marlboro 85 was your regular filtered, 85  
20 millimeters in length; correct?

21 A. I assume that's right.

22 Q. Well --

23 A. This is someone else's document.

24 Q. I don't want to put words in your mouth. You  
25 are the expert. What is a Marlboro 85?

26 A. Marlboro 85, as far as I am concerned, was  
27 that product.

28 Q. All right. It says total nicotine delivered,  
29 1.15. Free nicotine, .33. Percentage of free  
30 nicotine in a Marlboro 85, 28.7. Do you see that?

31 A. I have already said it says what it says,  
32 yes.

21427

1 Q. All right. And you see what it says about  
2 Merit, which was supposed to be a light cigarette;  
3 correct?

4 A. Yes.

5 Q. But the free nicotine, according to this  
6 test, in a Marlboro 85 is almost exactly the same as  
7 it is in your light cigarette; isn't that true?

8 MR. GAY:

9 Objection to -- let it go. I'm  
10 sorry, Your Honor. I'm sorry, go ahead.

11 A. The free nicotine, unless -- I mean, I don't  
12 know how they did this calculation to get a value  
13 for free nicotine. It's not a number that I know of  
14 that can be measured. It's not a published method.  
15 I just don't know what they mean by this.

16 I can tell you there is no way this amount of  
17 free nicotine exists in either one of these  
18 products.

19 Q. You didn't bring any of your own lab studies  
20 to say that, did you?

21 A. No, and I don't need any, because I was  
22 there, I did the work, and I know what I did.

23 Q. But there is no one that brought it here that  
24 can test this. I mean --

25 A. I come with personal knowledge about it.

26 Q. Thank you, sir.

27 A. I'm sorry.

28 Q. Now, if you wanted to take a light cigarette

29 and increase the amount of free nicotine, wasn't  
30 Philip Morris adding ammonia and urea to accomplish  
31 that purpose?

32 A. No.

21428

1 Q. Well, how would you manipulate your tobacco  
2 in a light cigarette to accomplish the same amount  
3 of free nicotine in a cigarette that wasn't light?

4 A. I don't know. Maybe you can tell me. I  
5 don't know how to do it.

6 Q. Well, I don't know how it was done.

7 A. We didn't do it.

8 Q. Okay. Well, there was Philip Morris  
9 published reports on smoke manipulation; isn't that  
10 true? That is, published inside Philip Morris?

11 A. There may have been. I don't know.

12 Q. You don't recall reading them?

13 A. I don't recall specifically, no.

14 MR. RUSS HERMAN:

15 Your Honor, I would like to put on  
16 the screen Exhibit 3743 that's in evidence  
17 as of February 24, '03.

18 May I approach?

19 THE COURT:

20 Yes.

21 THE WITNESS:

22 Thank you, sir.

23 MR. RUSS HERMAN:

24 You are welcome, sir.

25 BY MR. RUSS HERMAN:

26 Q. I would like you to look at the first page.

27 MR. RUSS HERMAN:

28 May we publish, Your Honor?

29 MR. GAY:

30 No objection.

31 THE COURT:

32 You may publish.

21429

1 MR. RUSS HERMAN:

2 The next page, please, Carl? Now,  
3 would you blow up the top, enlarge it?

4 BY MR. RUSS HERMAN:

5 Q. Philip Morris U.S.A. Research Center;  
6 correct?

7 A. Yes.

8 Q. Smoker Psychology; correct?

9 A. Yes.

10 Q. You had a whole -- 1600, you had a smoker  
11 psychology division within research, didn't you?

12 A. It didn't have sixteen hundred people in it.

13 Q. No, sir. That was the title, that was the  
14 index so you could find out whatever you wanted  
15 about smoker psychology, you could call up the 1600  
16 code number; isn't that correct?

17 A. The number for smoker psychology I guess was  
18 1600.

19 Q. All right. 1976; correct?

20 A. Yes.

21 Q. You were there?

22 A. Yes.

23 Q. It says confidential?

24 A. It does.

25 Q. They never showed it to you?

26 A. I don't recall seeing this, no.  
27 MR. RUSS HERMAN:  
28 Would you blow up --  
29 A. It doesn't mean I couldn't have got it.  
30 MR. RUSS HERMAN:  
31 Carl, blow up the words "Manipulating  
32 smoke impact," et cetera.

21430

1 BY MR. RUSS HERMAN:  
2 Q. Never read this document, did you, sir?  
3 A. I don't recall.  
4 MR. GAY:  
5 Objection, repetitive.  
6 THE COURT:  
7 Sustained.  
8 MR. RUSS HERMAN:  
9 Okay, you can take it down.

10 BY MR. RUSS HERMAN:  
11 Q. The next subject I would like to cover with  
12 you --

13 MR. GAY:  
14 Objection, Your Honor. May we  
15 approach?  
16 THE COURT:  
17 Yes.  
18 (At sidebar:)  
19 MR. GAY:  
20 Your Honor, I object to counsel's use  
21 of the document.  
22 You instructed counsel, plaintiffs  
23 counsel not to just throw a document up,  
24 show it to the witness, and never ask a  
25 question about it.

26 That's what Mr. Herman did. I don't  
27 think there is much we can do about it at  
28 this point, but I would ask you to  
29 instruct him if he's going to show a  
30 document to a witness, that he ask a  
31 witness a question about it.

32 MR. RUSS HERMAN:

21431

1 I asked the witness if he was ever  
2 shown it. You objected as repetitive, so  
3 I went to something else.

4 THE COURT:  
5 Next question, please. You have  
6 about --

7 MR. RUSS HERMAN:  
8 That's what I was about to say. My  
9 next subject will take some time. If you  
10 want to break now, we will come back at  
11 1:30 --

12 THE COURT:  
13 I'm going to monitor the weather  
14 report at the noon news, and if it looks  
15 really bad, we may have to make a  
16 decision. But we will deal with that at  
17 lunchtime.

18 Leave phone numbers with Donna before  
19 you leave and I will make a decision. I  
20 would like to be able to call you rather  
21 than make you come back.

22 (In open court:)

23                 THE COURT:  
24                 We are going to recess for lunch at  
25                 this point until 1:30 by the wall clock.  
26                 (In open court without a jury  
27                 present:)  
28                 THE COURT:  
29                 Let the record reflect the jury has  
30                 left the courtroom.  
31                 Anything for the record by plaintiffs  
32                 counsel?

21432

1                 MR. RUSS HERMAN:  
2                 No, Your Honor.  
3                 THE COURT:  
4                 Defense counsel?  
5                 MR. WITTMANN:  
6                 No, Your Honor.  
7                 THE COURT:  
8                 I indicated to Mr. Herman and Mr. Gay  
9                 that -- Mr. Herman informed me that the  
10                weather report for the afternoon was bad.  
11                There is heavy rains.

12                I'm going to monitor the weather  
13                report during the lunch hour. If it looks  
14                really bad, we may have to make a decision  
15                about recessing earlier today.

16                But I would like counsel to leave a  
17                contact phone number with my Clerk. In  
18                case I make that decision, I can  
19                communicate with you so you don't have to  
20                come back to the courthouse.

21                We will recess until 1:30.  
22                (Whereupon, the hearing recesses at  
23                11:55 a.m.)

24  
25  
26  
27  
28  
29  
30  
31  
32                21433

1                 REPORTER'S CERTIFICATE  
2

3                 I, NICHOLAS A. MARRONE, CCR, Registered  
4                 Merit Reporter, do hereby certify that the foregoing  
5                 proceedings were reported by me in shorthand and  
6                 transcribed under my personal direction and  
7                 supervision, and is a true and correct transcript,  
8                 to the best of my ability and understanding.

9                 That I am not of counsel, not related to  
10                counsel or the parties hereto, and not in any way  
11                interested in the outcome of this matter.

12  
13  
14                NICHOLAS A. MARRONE (CCR 21011)  
15                CERTIFIED COURT REPORTER  
16                REGISTERED MERIT REPORTER  
17  
18

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32